

The exclusivity provisions in ABC's agreement with the CFA reduce the extent of direct, head to head competition between ABC's college football telecasts and other college football telecasts and thereby enable ABC to achieve higher audience ratings for its telecasts than would otherwise be available.<sup>12</sup>

Supporters of such contracts, including ABC, ESPN and regional sports channels proffer two basic arguments to justify these arrangements. First, they argue that the arrangements are pro-competitive. They create an efficient vehicle for advertisers by giving them larger audiences on a single program. Second, by enhancing ABC's competitive position, it can compete with cable sports channels for games, thereby reducing the likelihood that sports programming will migrate to subscription service. INTV believes both justifications are invalid. We are not alone.

#### **A. Preclusive Contracts are Not Pro-Competitive**

The pro-competitive justification has been soundly rejected by the courts. In Regents of California v. American Broadcasting Companies, Inc., 747 F.2d 511 (9th Cir. 1984), the Court rejected ABC's claim that the ABC-CFA contract was pro-competitive.

The ABC-CFA "arrangement" just as the NCAA television plan that fell before it share the dual infirmities of an intentional reduction in output along with the imposition of sharp restraints on individual school competition. Moreover, this conclusion applies with as much force to the ABC-CFA contract considered as a whole as it does to the component restraints found in the cross

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<sup>12</sup>ABC Comments in PP docket No. 93-21, March 29, 1993, at 11.

over restriction.<sup>13</sup>

In addition to the Ninth Circuit, the Federal Trade Commission's Bureau of Competition does not accept the proposition that time period exclusivity provisions are pro-competitive. With respect to the claim that preclusive arrangements are necessary to achieve higher ratings the Bureau has stated:

In essence, the sponsored CFA game achieves higher ratings by excluding competing telecasts of other attractive CFA games. The gain for the CFA-sponsored telecast is generated at the expense of reduced football viewing options for consumers, reduced commercial time for advertisers and reduced overall ratings (i.e. viewership) for college football. Respondents' argument runs counter to the basic economic principle that efficiencies only arise when market output is increased. It therefore cannot be treated as a cognizable efficiency.<sup>14</sup>

In response to the claim that the arrangement promoted efficiencies by reducing transaction costs for advertisers the Bureau of Competition stated further:

However, respondents cannot show that the restraints are at all related to transaction costs, nor that CFA involvement reduces those costs. In any event, as discussed above, the Supreme Court has held that restraints like the CFA's are not necessary for college football to be televised effectively.<sup>15</sup>

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<sup>13</sup>Regents of California v. American Broadcasting Companies, Inc., 747 F.2d at 518.

<sup>14</sup>Complaint Counsel's Non Binding Statement, Federal Trade Commission, Bureau of Competition, Docket No. 9242, October 26, 1990 at 23. See Exhibit B.

<sup>15</sup>Id. at 22-23

When taken together, the Bureau of Competition observed that the time period exclusivity arrangements between ABC, ESPN, CFA, PAC-10 and Big-10 raised significant competitive concerns:

The network and time period exclusivity provisions obviously prevent other telecasters from competing with ABC and ESPN for viewers and advertising revenues. Additionally, by purchasing the exclusive CFA package (and adding it to the exclusive Big-10/PAC-10 package it already held), Capital Cities recognized that it would be able to reduce the number of college football network exposures, thus decreasing the available time or advertising and giving it the ability to charge college football advertisers a significant premium.<sup>16</sup>

In sum, the Bureau of Competition found that the ABC and ESPN contracts with college football effectively prevented others from telecasting games. In this regard, it was not persuaded by ABC and ESPN's attempt to argue that such contracts were permissible because of the possibility of "individual competition." This defense, which stems from the Supreme Court's decision in Broadcast Music Inc. v. CBS, Inc., 441 U.S. 1, 99 (1979), is based on the argument that a joint selling arrangement may be pro-competitive if it has the effect of increasing the total volume of output. The Bureau of Competition rejected this position arguing that the contractual arrangements actually decreased the output of college football broadcasts. Also, the Ninth Circuit, relying on the NCAA case, has rejected this argument.<sup>17</sup>

INTV is fully aware that an administrative law judge has dismissed the Bureau of Competition's complaint because of

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<sup>16</sup>Id. at 27.

<sup>17</sup>Regents of the University of California v. American Broadcasting Companies, Inc., 747 F. 2d at 518.

jurisdictional concerns. This matter is on appeal to the full Federal Trade Commission. Nevertheless, the issues which form the substantive basis for the complaint remain.

Independent of any specific antitrust violation, INTV believes that the facts justify Commission action under the Communications Act. Preclusive contracts of this type artificially reduce the number of college football games that can be made available to the public. As a result, games are either not seen or become subject to pay-per-view type services. Moreover, the restrictions impede competition. Because of their inability to access games, local stations are effectively precluded from competing for local college sports rights. Local advertisers, that are searching for targeted sports audiences, move to other venues. Lost revenue impairs a station's ability to provide other programming that meets the needs and interests of their local communities.

INTV also recognizes that preclusive contracts are not limited to the ABC and ESPN arrangements. As we observed in our initial comments in this proceeding, preclusive type contracts have been employed by regional cable sports networks to further limit the availability of college football games.

In the Further Notice the FCC asked for additional evidence regarding the preclusive effects of these contracts. ABC, of course, asserts that its arrangements actually help prevent the migration of sporting events away from over-the-air television. This is simply not the case.

**B. Statistical Analysis Reveals College Games Have Migrated Away From Off-Air Television.**

In previous comments, INTV provided graphic evidence of the problems local stations have contracting with local colleges and universities in order to broadcast local college football. The current contractual arrangements create a series of time block exclusivity windows that make it impossible to broadcast live college football games.<sup>18</sup>

This difficulty was supported empirically by the attempts of KCPQ-TV Channel 13 in Seattle to broadcast live college football games. Every year this station attempts to broadcast several Washington State and/or University of Washington games. The data indicate that the station could obtain some games in 1988 (5 games), 1989 (3 games) and 1990 (4 games). However, since 1990 the station has been unable to secure the rights to any games.<sup>19</sup>

We also documented similar problems in Arizona, where KUTP-TV Channel 45 in Phoenix has been unable to obtain rights to live college football games since 1990.<sup>20</sup> The same has been true for KMSB-TV Channel 11 in Tucson regarding coverage of Arizona State football. We also documented the problems of KMPH-TV, Channels 26 in Fresno with respect to Fresno State Football games.<sup>21</sup>

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<sup>18</sup> See Exhibit C.

<sup>19</sup> INTV Comments in PP Docket No. 93-21, March 29, 1993 at 10-11.

<sup>20</sup> Id.

<sup>21</sup> See also, Reply Comments of Pappas Telecasting Companies, April 12, 1993.

All of these stations have a long history of providing live coverage of college football games in their communities. All of them have had extreme difficulties in securing the rights to games as a result of the ABC, ESPN, Prime Ticket and SportsChannel contracts.

The decline in college football games on over-the-air television is far more pervasive than these examples indicate. Between 1988 and 1992, the number of college football games on CBS and NBC dropped from 14 to 7. (It was during this time period that CBS exited college football, and NBC, beginning in 1991, started to broadcast Notre Dame games.) During this same period the number of games appearing on ABC increased from 16 to 60.<sup>22</sup>

However, the non-network sector of college football has steadily declined. In 1988, two broadcast syndicators distributed 64 games on television. This number dropped to 42 in 1992.<sup>23</sup>

Contrast the declines in broadcast coverage to the virtual explosion in college football games appearing on a variety of cable networks at the national, regional and pay-per-view level. National cable networks distributed 50 games to college football fans in 1988. By 1992 this number more than tripled, amounting to 192 games.<sup>24</sup> While ESPN's share of the market remained constant (40 games in both 1988 and 1992), Prime Network increased from zero games in 1988 to 99 games in 1992. SportsChannel America had no

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<sup>22</sup>Paul Kagan Media Sports Business, January 31, 1993 at 8.

<sup>23</sup>Id.

<sup>24</sup>Id.

games in 1988 and 48 games in 1992.

Regional pay sports channels, which include New England Sports Net, PRISM, Sports Channel LA (now defunct) and Sports Channel Pacific more than doubled the number of college football telecasts. In 1988 these services cablecast 105 games. This number increased to 280 in 1992.<sup>25</sup>

The largest explosion occurred in regional advertiser-supported cable sports networks. In some instances these networks are part of a basic cable package. However, some of these services are made available on a subscription basis on some cable systems. In 1988 these services cablecasted 676 games. By 1992 these services cablecasted 2,265 games.<sup>26</sup>

Consistent with the Commission's desire to analyze long term trends in the broadcasting of college football, INTV has conducted an in-depth analysis of several television markets. The analysis is based on a survey of Saturday television sports listings from major market newspapers.<sup>27</sup> We analyzed the years from 1984 through

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<sup>25</sup>Id.

<sup>26</sup>Id. Kagan considers the following sports channels as basic/tier ad-supported networks. Arizona Sports Net, Empire Sports Net, Home Sports Entertainment, Home Team Sports, KBL sports, Madison Square Garden Network, Midwest SportsChannel, Pacific Sports Net., Prime Sports Inter-mountain West, Prime Sports Rocky Mountain, Prime Sports NW, Prime Ticket, Pro Am Sports System, PSN-Midwest, PSN-Upper Midwest, SCA-Philadelphia, SportsChannel-Chicago, SportsChannel-Cincinnati, SportsChannel-Florida, Sports Channel-N.E., SportsChannel-Ohio, SportsSouth and the Sunshine Network(Fla).

<sup>27</sup>Limiting the analysis to Saturday's appears reasonable given the fact that most college football is played on Saturday. However, this approach may underestimate the number of games appearing on cable networks. For example, ESPN cable casts a

1992. The base year, 1984, was used because it was the first season after the Supreme Court's ruling in the NCAA case.

Our initial analysis focuses on regular season games. These are the games that local television stations were typically able to contract directly with the schools to broadcast after the NCAA case. Accordingly, bowl games are not included in the statistics presented below.

### 1. San Francisco

The table below was based on the Saturday television sports listings reported in the San Francisco Chronicle for September through December for the years 1984 to 1992. The Chronicle's sports listings are not limited to television stations located in San Francisco. The paper will provide listings for stations in San Francisco, Sacramento/Stockton, San Jose, Salinas/Monteray, Chico-Redding and Santa Rose. As a result, the Chronicle's listings provide a valid source of information for several television markets in central California.

Also, for the most part, each market has a network affiliate. For example, ABC has affiliates in San Francisco (KGO-TV, Channel 7), Sacramento/Stockton (KQVR-TV, Channel 13) and San Jose (KNTV-TV, Channel 11). When analyzing data from the Chronicle, we counted each game that appeared on each individual television station. Such an approach appropriately focuses on the viewing choices that are available to the public in each market.

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Thursday night game during the college football season.

Accordingly, a game appearing on the ABC network, which was carried on the San Francisco, Sacramento and San Jose affiliates, was considered to be three listings and counted as such.

A comparison of the number of games appearing on over-the-air television and cable networks appears below in Table 1.

Table 1.

**SAN FRANCISCO AREA**  
**College Football**  
**1984 - 1992**

<b><u>YEAR</u></b>	<b><u>OFF-AIR</u></b>	<b><u>CABLE</u></b>
1984	141	28
1985	142	24
1986	174	25
1987	131	31
1988	106	31
1989	104	54
1990	75	78
1991	78	58
1992	72	86

Source: San Francisco Chronicle, Saturday TV Sports Listings  
 (Sept.-Dec./1984-1992)

The data demonstrate a significant decline in the number of games that were broadcast. A close examination of the numbers reveals several important considerations. First, immediately after the NCAA decision the number of games available on over-the-air television increased. The number falls dramatically between 1986 and 1987. Interestingly, 1987 was the first year of ABC's contract with the PAC-10 and the Big-10. Beginning in 1989, ESPN and Prime

Sports Network commenced telecasting PAC-10 and Big-10 games on cable.

Beyond the ABC/ESPN/Prime Network arrangements, there was a significant decline in games between 1989 and 1990. Interestingly enough, 1990 was the first year the SportChannel began to telecast college football games in San Francisco.

Importantly, the overall decline in college football games in San Francisco is further illustrated by the decline in coverage of non-network local games. Schools such as San Francisco State, San Jose State, Fresno State, Sacramento State, U. Cal Davis, Long Beach State and University of California had a history of contracting directly with local stations to provide coverage of their games. Over-the-air coverage of these games is particularly important because it provides everyone with an opportunity to watch their local college team. It also demonstrates the increasing difficulty local station have in contracting directly with individual schools. The preclusive exclusivity contract coupled with new agreements between the conferences and regional cable networks have all but eliminated local coverage of local teams in the San Francisco area.

Table 2.

Non-Network Games Involving Local  
Schools 1984-1992

Year	Non-Network Games	Games on Regional
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	Broadcast	Cable Networks
1984	4	1
1985	12	2
1986	13	5
1987	12	1
1988	9	1
1989	11	8
1990	3	24
1991	6	13
1992	0	7

The decline in over-the-air broadcasts is not limited to the San Francisco market. The same scenario is occurring in other markets as well.

## 2. Tucson

In our initial comments we noted that it has become almost impossible for local television stations to contract with the University of Arizona and Arizona State to provide live broadcast coverage. However, it appears that the overall number of games provided by over-the-air television have declined.

An examination of the Saturday TV sports listings from the Tucson Citizen, indicates that the problems occurring in San Francisco are not unique. As demonstrated in Table 3. below, the number of games available on off-air television broadcasting increased after the NCAA decision from 45 in 1984 to 54 in 1986. Beginning in 1987, the first year of ABC's PAC-10 contract, the number of games drops to 40. SportsChannel began cablecasting games in 1989 and games dropped again from 41 in 1988 to 34 in 1989. In 1992, the number of games available to the people of

Tucson declined to 30, with six of these games being tape delayed games. Thus there were only 24 live games broadcast in Tucson.<sup>28</sup>

Table 4.

TUCSON, ARIZONA  
College Football  
1984 - 1992

<u>YEAR</u>	<u>OFF-AIR</u>	<u>CABLE</u>
1984	45	29
1985	43	27
1986	54	24
1987	40	31
1988	41	34
1989	34 (3)	38 (4)
1990	43 (7)	80 (2)
1991	28 (3)	81 (2)
1992	30 (6)	68 (7)

( ) Indicates tape delayed game.

Source: Tucson Citizen, Saturday TV Sports Listings (1984-1992)

The problem becomes more significant when examining the specific coverage of live University of Arizona and Arizona State games in Tucson. The following table tracks the live coverage of these schools on off-air television and cable networks.

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<sup>28</sup>Note that the number of games listed for cable networks drops from 81 in 1991 to 68 in 1992. This does not mean that the number of games appearing on cable declined. Two of the major cable operators in Tucson dropped Prime Ticket. As a result there are no television listings for Prime Ticket in 1992. What this means is that Prime Ticket, which holds the regional cable rights to PAC-10 games was not seen in Tucson.

Table 5

Coverage of Live University of Arizona  
and Arizona State Games.

Year	Broadcast	Cable
1984	12	0
1985	12	0
1986	14	1
1987	14	0
1988	12	1
1989	10	1
1990	6	3
1991	5	4
1992	3	0

The most significant development in the Tucson market is the fact that live coverage has almost become a thing of the past. The local ABC affiliate carried ten live games in 1984, ten live games in 1985 and 12 live games in 1986. This number was reduced to four live games in 1987, the first year of ABC's new contract with the PAC-10. However, the decline was taken up by the Fox-independent KMSB, which broadcast ten live games in 1987 and 1988. Beginning in 1989, the first year of the ESPN/Prime Ticket contract with the PAC-10, the number of live games appearing on KMSB dropped to seven. Three live games appeared on the ABC affiliate, presumably part of network coverage and three tape delayed games appeared on KMSB. In 1990, the first year of SportsChannel's telecasts, the number of live games on KMSB dropped to three. In 1991 the station had two live broadcasts. In 1992 KMSB had only one live broadcast. The remaining six games appearing on the station were tape delayed games. In fact only two live Arizona or Arizona state games were

broadcast live on the ABC affiliate. One other game, Arizona v. LSU appeared on pay-per-view.

There is no question that the combination of the ABC, ESPN/Prime Ticket arrangement with the PAC-10 have decreased the number of live telecasts in Tucson.

### 3. Minneapolis

The problem is not confined to the West coast. The Minnesota Golden Gophers have a proud football tradition. Nevertheless, over time the number of games appearing on broadcast television in Minneapolis have declined steadily. The following analysis is based on the Saturday TV sports listings appearing in the Minneapolis Star Tribune during the month of November for the years 1984 through 1992. November is an active football month and includes the traditional November sweeps period. Accordingly it is representative of the entire season.

Table 6  
College Football Coverage in  
Minneapolis  
November 1984-1992

Year	Broadcast Coverage	Cable Coverage
1984	13	11
1985	21	15
1986	22	17
1987	14	10
1988	14	13
1989	9	14
1990	11	26
1991	10	37
1992	10	26

Source: Minneapolis Star Tribune, November, Saturday sports listings, 1984-1992.

The statistics presented above include all over-the-air broadcast coverage including games appearing on the networks. Again, a significant increase in games occurred after the NCAA decision. There is also a dramatic decline in the number of games beginning in 1987, the first year of ABC's contract with the Big-10. By 1992 the number of games appearing on off-air television was less than half the number broadcast in 1986.

Most troubling, however, is the number of Minnesota games that were made available to the public during this period. In 1985, KITN broadcast three Minnesota games. It also broadcast two Minnesota games in 1986, and one game each year in 1987 and 1988. Minnesota also appeared as part of the ABC networks coverage in 1987. Since that time, however, no listing of a live Minnesota game appears in the sports listings.

#### **C. Preclusive Contracts are Contrary to the Public Interest.**

INTV is in the process of providing the Commission with additional data regarding the decline of college football games on over-the-air television. It is our intent to provide the Commission with such data as soon as possible, hopefully before the reply comment deadline.

Nevertheless, we believe the Commission has sufficient data before it to draw some firm conclusions. First, the high water mark of college football games on over-the-air television appears to have been 1986. Since that time ABC and ESPN's preclusive arrangements have made it all but impossible for local stations to contract individually with schools to broadcast live college football games. Also, the problem has been exacerbated by similar contractual arrangements between the conferences and regional cable sports channels.

Local stations are last in line when it comes to securing the rights to live college football games. Conference agreements with the broadcast networks, national cable networks and regional cable sports channels take priority over individual stations' negotiations with local schools.

The Commission is correct in observing that the proposed break up of the CFA could change this situation. However, preclusive time block exclusivity contracts have become a common tool to limit head to head competition. There is every reason to believe new conference arrangements with a broadcast or cable network will include similar provisions. Accordingly, we believe the time is ripe for the FCC to find that such arrangements are contrary to

the public interest. Such a policy will insure that the next round of agreements will limit the ability of local stations to broadcast games in the future.

Of course it is impossible to predict what new contract provisions will be in the future. Nevertheless, the Commission already has before it significant documentation that the CFA, PAC-10 and Big-10's contracts with ABC and ESPN have reduced the supply of games that are made available to the American public. At the very least, the FCC should find that these contracts are inconsistent with the Communication Act's goals of promoting diversity. This will serve as a precedent to prevent other arrangements from continuing the evils of the present situation that occur in PAC-10 and Big-10 markets.

#### **IV. SPORTS SIPHONING RULES ARE CONSISTENT WITH FIRST AMENDMENT CONSIDERATIONS**

The leading case on the issue of siphoning is HBO v. FCC<sup>29</sup>. In that case, HBO won the right to air not only sporting events, but virtually all other forms of entertainment that it was previously prohibited from carrying under the FCC's anti-siphoning rules, 47 CFR Section 76.225 (1976). Regardless of the outcome, the HBO decision reached several poor conclusions, based on data that is no longer accurate or applicable, and utilized factual arguments that are outdated and have no relevance in the world today.

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<sup>29</sup> HBO V. FCC, 567 F.2d 9 (1977).

The HBO court reached its conclusions on the grounds that the FCC's anti-siphoning rules were too broad, that the cable industry did not pose a viable threat to broadcasting, that no evidence was presented which indicated that siphoning was occurring at the time or would occur absent the rules, and that the anti-siphoning rules, when viewed in light of the marketplace as it existed at the time of the decision, violated the First Amendment of the Constitution.

The FCC's anti-siphoning rules, subject to the scrutiny of the HBO court, were very broad. Not only did the rules cover sporting events, but they encompassed almost every type of entertainment from feature films to series programming. The protection of free television from siphoning, regardless of a real or imagined threat to broadcasting, was sheltered under an umbrella of non-specific rules. The rules, as written, made no specific references to the differences between the types of events that could be shown and the ways in which the events differed from one another. In essence, the rule functioned as a blanket restriction against all siphoning.

Now, seventeen years after HBO, the Commission is looking at the possible implementation of far more tailored and detailed anti-siphoning rules dealing exclusively with sporting events. When analyzed by the courts, in light of the market forces that now drive the industry, these rules could in no way be viewed as being overbroad.

The HBO case was decided in 1977, at a time when cable had a penetration of approximately 9.8 million homes or 14 percent of the United States. Broadcasting was the prevalent form of media

received by the American household. The Court stated that "extension of cable service with cablecasting capability to the country as a whole did not seem possible in the immediate future."<sup>30</sup> Even if siphoning was occurring, the Court seemed to feel that it posed little or no threat of harm to broadcasting or the public interest. The anti-siphoning rules were unnecessary since they neither addressed an existing problem/harm, nor one that the Court felt would materialize in the near or foreseeable future.

Cable has grown far beyond the Court's expectations in 1977. In contrast to the 14 percent penetration at the time HBO was decided, today cable is capable of serving over 90 percent of the American public. Over 60 percent of Americans now subscribe to basic cable service. If the Court was deciding HBO today, the exponential growth of cable and its dominating impact on the marketplace, as well as economic realities, would dictate a different outcome than was reached in 1977.

Another contributing factor to the Court's conclusion was the lack of evidence that siphoning was occurring or would occur absent the Commission's rules. Evidence of siphoning which the Court used in its analysis was confined to "some championship boxing matches and Evel Knievel's Snake River Canyon stunt."<sup>31</sup> The Court did not envision siphoning as a threat to regularly viewed, popular sporting events, e.g., baseball and college football. The evidence presented by INTV in this proceeding is more than sufficient to

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<sup>30</sup> Id. at 24.

<sup>31</sup> Id. at 37.

justify sports siphoning rules.

Cable companies now possess the financial capability to attract sports programming by paying a greater dollar amount than the broadcasters' advertisers. Almost every sport has some events on cable, and as the amount of money cable is capable of spending grows, so too will the amount of siphoning. Eventually, all events will be forced, through simple economics, to go to cable. Sports programming will thus become unavailable to those individuals who cannot afford cable television and who rely on broadcasting as their informational and entertainment medium.

Part of the HBO Court's decision was based on the fact that the Commission "must either demonstrate specific support for its actions in the language of the Communications Act, or at least be able to ground them in a well understood and consistently held policy developed in the Commission's regulation of broadcast television."<sup>32</sup> At the time the Court reviewed the rule, siphoning was speculative in nature since there was no tangible threat to broadcasting. The Court, moreover, stated that a "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."<sup>33</sup> What the Court did not foresee, however, is the steady and tremendous increase in revenue which cable has been deriving by siphoning sports from broadcast television. Over the past five years, cable has almost doubled the amount of money it has received from sports

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<sup>32</sup> Id. at 28.

<sup>33</sup> Id. at 36.

programming, achieving \$697.6 million in revenue for 1993.<sup>34</sup> Even to the casual observer it is plain that siphoning no longer applies to novelty sporting events, but has reached into the everyday world of sports.

A final issue raised by the Court concerns the First Amendment of the Constitution. United States v. O'Brien<sup>35</sup> provided a two-prong test which the Court applied to the siphoning rules. First, the rules must advance a substantial government interest. Second, the rules must be narrowly tailored to advance that interest. According to the HBO Court the anti-siphoning rules failed to withstand constitutional scrutiny. Neither prong of the O'Brien test could be met. First, the substantial governmental interest in protecting free television could not be advanced since evidence of present siphoning activity was scarce, and future activity merely speculative. Second, the anti-siphoning rules were determined to be overly broad, not narrowly tailored to advance the public interest at stake.

Looking at cable today, one can eliminate all speculation as to the possibility of siphoning. The fledgling industry that was cable in the mid-1970s is now a media giant. Siphoning has become a reality and must be checked in order to safeguard the public interest in free television. Thus, the first prong of the HBO court's O'Brien analysis is no longer relevant. The second prong,

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<sup>34</sup> Kagan, Paul, "Media Sports Business," No. 154, February 28, 1993, p. 2.

<sup>35</sup> United States v. O'Brien, 391 U.S. 367 (1968).

that of narrow tailoring, can also be satisfied now. As written, the old rule treated the many diverse types of programming equally. A rule aimed precisely at specific sports and/or the elimination of preclusive contracts, would be sufficiently tailored to meet First Amendment requirements. Both prongs of O'Brien being satisfied, the new rule would pass Constitutional muster.

Many changes have occurred since the HBO Court looked at siphoning in 1977. Whereas cable was then a small industry without a great deal of power, today cable has a large market presence in media with much power. While siphoning was not a major business in 1977, today it generates hundreds of millions of dollars. The facts have changed. Narrowly tailored siphoning rules that advance the government's substantial interest in protecting free television are no longer of an imaginary need as the Court thought in 1977.

## V. CONCLUSION

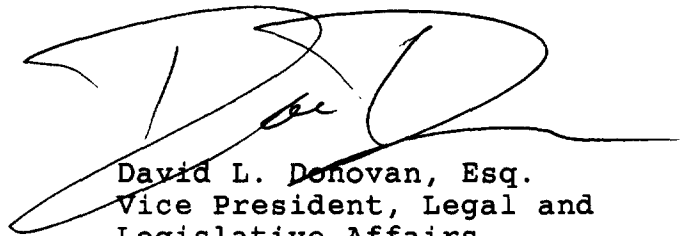
There is ample evidence to demonstrate that for certain sports, sports migration is a considerable problem. INTV believes that the FCC should recommend to Congress that the Commission move forward, on its own, to craft rules which would prevent further siphoning for specific sports. As part of this recommendation, the Commission should state that the preclusive contracts existing in Major League Baseball and college football are against public policy.

There is nothing in the 1992 Cable Act which divests the

Commission of its jurisdiction to enact specific rules in this area. That authority has always rested with the Commission. Accordingly, a recommendation that the FCC will move forward in this area is consistent with the Commission's authority to adopt rules protecting the public interest.

Importantly, the FCC cannot ignore the significance of its oversight authority as it relates to this issue. The mere fact that the Commission is concerned with this matter may serve to keep sports from migrating away from over-the-air television.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'D. Donovan', is written over the typed name and title.

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## **EXHIBIT A**

# MAJOR LEAGUE BASEBALL

TEAM	BROADCAST					CABLE		
	1980	1984	1993	DIFF. 93-80	DIFF. 93/84	1984	1993	DIFF.
<b><u>NATIONAL</u></b>								
Reds	41	46	53	+12	+7	52	35	-17
Astros	66	71	67	+1	-4	79	55	-24
Dodgers	32	46	46	+14	-	15	0	-15
Mets (-)	88	87	75	-13	-12	60	75	+15
Phillies (+)	73	81	85	+12	+4	30	68	+38
Pirates (+)	44	39	53	+9	+14	-	59	+59
Cards (^)	38	39	77	+39	+38	52	-	-52
Padres (+)	37	49	48	+11	-1	40	50	+10
Giants (+)	33	31	47	+14	+16	-	55	+55
Braves	96	148	125	+29	-23	-	28	+28
Cubs	137	149	140	3	-9	-	12	+12
<b><u>AMERICAN</u></b>								
Orioles	52	50	50	-2	-	80	85	+5
Boston (-)	92	69	75	-17	+6	87	81	-6
Angels	29	35	50	+21	+15	17	20	+3
White Sox (-)	114	51	48	-66	-3	102	110	+8
Cleveland (-)	69	50	60	-9	+10	25	45	+20
Detroit	47	46	47	0	+1	80	70	-10
Royals (^)	42	40	62	+20	+22	52	-	-52
Brewers (^)	39	30	65	+26	+35	67	-	-67
Twins (^)	49	50	61	+12	+11	50	73	+23
Yankees (-)	100	96	50	-50	-46	44	108	+64
Oakland (+)	29	44	50	+21	+6	-	59	+56
Mariners (^)	21	50	60	+39	+10	-	-	-
Rangers	24	29	90	+66	+61	100	58	-42